FILED
021809 JUN 3 2003
OFFICE OF THE CLERK

No. ——

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General

PAULA S. BICKETT
Chief Counsel, Civil Appeals

JOSEPH KANEFIELD*
Special Assistant Attorney General

1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8392

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

60PP

QUESTION PRESENTED

Did the Ninth Circuit err in holding, in conflict with the First, Sixth, and Eleventh Circuits, that the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement of Facts	3
B. Proceedings Below	4
REASONS FOR GRANTING THE WRIT	
I. Review Is Warranted to Resolve the Conflict in the Circuits Over Whether the Tax Injunction Act and Principles of Comity Prohibit Challenges to State Tax Provisions that May Result in Increased Revenue	7
II. The Ninth Circuit's Decision Conflicts with the Plain Language of the Tax Injunction Act and the Decisions of This Court Interpreting It and the Principles of Comity	11
III. The Question Presented Is an Important One that Warrants This Court's Review	15
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
CASES	
Arkansas v. Farm Credit Servs., 520 U.S. 821 (1997)	12
California v. Grace Brethren Church, 457 U.S. 393 (1982)	8, 9, 12, 13
Colonial Pipeline Co. v. Collins, 921 F.2d 1237 (11th Cir. 1991)	8, 10, 11
Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986)	8
Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981)	5, 3
Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)	15
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 298 (1943)	6, 15
In re Gillis, 836 F.2d 1001 (6th Cir. 1988)	5, 8, 9, 11
Kotterman v. Killian, 972 P.2d 606 (Ariz.1999)	3, 4, 15
Kotterman v. Killian, 528 U.S. 921 (1999)	3, 15
Moton v. Lambert, 508 F. Supp. 367 (N.D. Miss. 1981)	8
Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582 (1995)	12, 13
Rhodes v. Killian, 528 U.S. 810 (1999)	3, 4
Richards v. Jefferson County, 517 U.S. 793 (1996)	16
Rojas v. Fitch, 928 F. Supp. 155 (D.R.I. 1996)	8

TABLE OF AUTHORITIES – Continued

Page

Stone v. Powell, 428 U.S. 465 (1976) 16

United States Brewers Ass'n, Inc. v. Perez, 592 F.2d 1212 (1st Cir. 1979) 8, 10, 11

Winn v. Killian, 321 F.3d 911 (9th Cir. 2003) 1

Winn v. Killian, 307 F.3d 1011 (9th Cir. 2002) 1

Winn v. Killian, No. CIV-00-287-PHX-EHC (D. Ariz. Feb. 26, 2001) 1

STATUTES

26 U.S.C. § 6201(a)(1) 14

26 U.S.C. § 6203 14

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1341 ..... 2, 12

42 U.S.C. § 1983 12

48 U.S.C. § 872 10

A.R.S. § 43-1089 ..... 2, 3, 4, 5

RULES

Supreme Court Rule 10(b) 11

Supreme Court Rule 35.3 1

OTHER AUTHORITIES

Black's Law Dictionary (1990) 13

Webster's Encyclopedic Unabridged Dictionary (1996) 11, 13

Webster's Third New International Dictionary (1981) 13

PETITION FOR A WRIT OF CERTIORARI

J. Elliot Hibbs, in his official capacity as Director of the Arizona Department of Revenue (State),[1] respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on March 5, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 307 F.3d 1011 (9th Cir. 2002), and is reprinted at Appendix (App.) 11. The denial of rehearing en banc and Judge Kleinfeld's dissent from that denial, which was joined by Judge O'Scannlain, is reported at 321 F.3d 911 (9th Cir. 2003), and is reprinted at App. 1. The district court's unreported decision is reprinted at App. 27.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its judgment and opinion on October 3, 2002. The Ninth Circuit denied the request for rehearing en banc on March 5, 2003. This petition has been filed

[1] J. Elliott Hibbs became the Director of the Arizona Department of Revenue on January 6, 2003, replacing Mark W. Killian. Accordingly, he has been substituted as a party pursuant to Supreme Court Rule 35.3.

within ninety days of the denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." Section 43-1089, Arizona Revised Statutes (A.R.S.), allows Arizona taxpayers to reduce their State tax liability by claiming a credit for amounts they have already paid to a "school tuition organization." The complete text of A.R.S. § 43-1089 is set forth at App. 37.

STATEMENT OF THE CASE

The TIA prohibits district courts from "enjoin[ing], suspend[ing], or restrain[ing]" the "assessment, levy or collection" of any state tax where a "plain, speedy and efficient remedy" is available in state court. 28 U.S.C. § 1341. This case presents a question that has divided the courts of appeals: whether the TIA and principles of comity require that the district courts dismiss constitutional challenges to state tax provisions that directly impact the administration of a State's tax system but do not interfere with the collection of revenue.

The Ninth Circuit held that the TIA and principles of comity do not apply to the Plaintiffs' challenge of Arizona's "school tuition organization" (STO) credit merely because

they seek to enjoin the granting of a tax credit, rather than the collection of state revenue. The Ninth Circuit's conclusion conflicts with the decisions of the First, Sixth, and Eleventh Circuits and this Court, ignores the statutory language of the TIA, which bars restraints on the *assessment* of taxes in addition to the *collection* of taxes, and disregards traditional notions of federalism.

The Ninth Circuit's overly narrow construction of the TIA and principles of comity will result in increased and duplicative federal court litigation involving all aspects of state tax administration despite plain, speedy, and adequate state court remedies. This case is a prime example of this unnecessary duplication. In 1999, two years after the enactment of A.R.S. § 43-1089, the Arizona Supreme Court provided a thoughtful and scholarly opinion on the same issues raised by the Plaintiffs in this case and this Court denied certiorari. *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999). According to the Ninth Circuit, however, those same issues must now be relitigated in federal district court. This Court should grant certiorari to address the circuit conflict and to clarify that the TIA and principles of comity preclude federal court interference with the administration of a State's tax system.

A. Statement of Facts.

In 1997, the Arizona Legislature enacted A.R.S. § 43-1089. (App. 12). That statute allows taxpayers to reduce their state tax liability by claiming a credit for amounts they have already paid to a school tuition organization ("STO"). Specifically, the statute permits any person owing

$500 or more in Arizona income taxes in any tax year to reduce their state tax liability by up to $500 if a contribution is made to an STO. (App. 28). The Arizona Legislature raised the maximum credit allowed for a married couple to $625 per year, effective January 1, 2001. (App. 12). STOs must use the donated funds to provide scholarships to students attending private elementary and secondary schools in Arizona, including religious schools. (App. 12-13, 28)

The Plaintiffs are Arizona taxpayers who allege that A.R.S. § 43-1089 violates the First and the Fourteenth Amendments of the United States Constitution because it authorizes the use of funds raised through state taxation to provide direct support for religious education. (App. 13, 29). Plaintiffs' suit seeks a declaration that the STO program violates the Establishment Clause and an injunction prohibiting the State's future operation of the program. (App. 13-14, 29). A different set of plaintiffs raised the same argument in the Arizona Supreme Court. *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999). The court held that A.R.S. § 43-1089 did not violate the Establishment Clause. *Id.*

B. Proceedings Below.

The Plaintiffs brought this action in the United States District Court for the District of Arizona to challenge the constitutionality of A.R.S. § 43-1089. The district court granted the State's motion to dismiss on the grounds that it had no subject-matter jurisdiction to hear the matter under the TIA and, alternatively, under the principles of comity. (App. 12, 36). The court found persuasive the Sixth

Circuit's interpretation of the TIA in *In re Gillis*, 836 F.2d 1001, 1005 (6th Cir. 1988), and held that the jurisdictional bar imposed by the TIA was not limited to lawsuits that challenge the collection of taxes. (App. 31). The court reasoned that the language of the TIA is not limited to the collection of taxes, noting that "[b]y preventing restraints on both the assessment and collection of taxes, Congress indicated that the TIA is not limited to collection only but was intended to encompass the process that the state uses in its determination of tax liability." (App. 31). The court determined that, when the State offers tax credits to reduce tax liability, the credits become an integral part of the State's assessment of each taxpayer's liability and thus any determination that A.R.S. § 43-1089 is unconstitutional would restrain the State's ability to assess taxes in accordance with its state tax system. (App. 31).

The court also held that even "[a]ssuming the tax credits are not covered by the specific language of the TIA, the underlying principles of comity and equitable restraint that are embodied in the [TIA] prevent this Court from exercising jurisdiction over the action." (App. 34) (citing *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108 (1981), and *Gillis*, 836 F.2d at 1005). "Recognizing the importance of state autonomy not only to collect taxes but also to administer its taxing system in accordance with state priorities and needs," the court concluded that Plaintiffs had "an adequate remedy available in the Arizona state courts and for that reason, the principles of comity require[d] Plaintiffs to utilize that remedy to challenge A.R.S. § 43-1089." (App. 35).

On appeal, the Ninth Circuit reversed, holding that the TIA and the principles of comity did not bar Plaintiffs' challenge to Arizona's tax credit. (App. 26). The court

narrowly defined "assessment" as used in the TIA to mean estimating the value of property or income as a basis for taxation or imposing a tax or other charge. (App. 16). Thus, the court concluded that a credit plays no role in the "assessment" of property or income as a basis for the imposition of taxes because it is applied after a taxpayer's gross income is determined. (App. 17).

The court also held that the Plaintiffs' suit is not barred by the principles of comity because it did not involve the collection of a tax. The court distinguished this Court's holding in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943), that comity prohibits federal courts from interfering with state tax administration, asserting that this Court's statements to that effect were dicta. (App. 23-25). Finally, the court placed the burden on the State to demonstrate that federal review of its tax statutes will harm it. (App. 26). The court then held that the State failed to identify a harm here that would render federal review unacceptably intrusive on its sovereignty. (App. 26).

In accordance with the Ninth Circuit's sua sponte order dated November 12, 2002, the parties filed supplemental briefs addressing whether the Ninth Circuit should rehear the case en banc. (App. 1). The State urged the court to grant rehearing. In a published order dated March 5, 2003, the court declined to rehear the case en banc. (App. 1). Judge Kleinfeld dissented from the denial and Judge O'Scannlain joined. (App. 2).

In his dissent, Judge Kleinfeld found that the panel's decision "sharply limits the traditional restraints on federal judicial interference with state tax systems and is in conflict with the position of the Sixth Circuit." (App. 2).

Judge Kleinfeld disagreed with the panel's narrow definition of the term "assessment" in the TIA and instead defined it as the process of calculating a person's final tax bill after all deductions and credits are accounted for, which is consistent with its definition in the federal income tax code, lay dictionaries, tax treatises, and law dictionaries. (App. 3-4). He found that, under this definition of assessment, "the Tax Injunction Act deprives the federal courts of jurisdiction to enjoin states from granting tax credits as part of the calculation due." (App. 5).

Judge Kleinfeld also determined that the doctrine of comity necessitated overturning the panel's decision. (App. 6). He found that under this doctrine, "federal district courts are required to dismiss claims asserting challenges to state tax systems, whether they are constitutional or not, and whether they are technically within the [TIA's] ban or not, so long as there is an adequate state remedy available." (App. 7).

REASONS FOR GRANTING THE WRIT.

I. Review Is Warranted to Resolve the Conflict in the Circuits Over Whether the Tax Injunction Act and Principles of Comity Prohibit Challenges to State Tax Provisions that May Result in Increased Revenue.

The Ninth Circuit's decision conflicts with decisions of the First, Sixth, and Eleventh Circuits, which have concluded that the TIA and principles of comity bar federal

court jurisdiction even when the result of deciding a state tax dispute would be to increase taxes.[2] *See United States Br vers Ass'n, Inc. v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *Gillis*, 836 F.2d at 1005; *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242 (11th Cir. 1991). The interpretation of the First, Sixth, and Eleventh Circuits is consistent with this Court's interpretation of the TIA in *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

The Sixth Circuit rejected the argument that the TIA should be construed narrowly to apply only when the federal action would interfere with the collection of state taxes. *Gillis*, 836 F.2d at 1005. In *Gillis,* the plaintiffs sought an injunction ordering tax officials to assess all real and personal property owned by coal, oil, and gas interests at full fair cash value. 836 F.2d at 1003. The plaintiffs alleged that the tax officials had violated their right to equal protection by assessing other taxpayers at less than full fair cash value, while plaintiffs were taxed at full value. In other words, the plaintiffs sought to have the court order the state officials to tax other taxpayers more. The plaintiffs argued that neither the TIA nor comity applied because their requested relief would enhance, not restrain, the collection of taxes. *Id.* at 1007-08. The court found it unnecessary to decide the TIA issue, because

[2] The Ninth Circuit relied on the Seventh Circuit's decision in *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986). The court also noted two district court cases that were consistent with its conclusion: *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I. 1996), *aff'd on other grounds*, 127 F.3d 184 (1st Cir. 1997), and *Moton v. Lambert*, 508 F. Supp. 367, 368 (N.D. Miss. 1981). Those decisions, like the Ninth Circuit's decision, are inconsistent with the language of the TIA and this Court's broad interpretation of the TIA.

comity required the dismissal of the action. *Id.* at 1005. Nevertheless, the Sixth Circuit rejected the plaintiffs' narrow construction of the TIA. *Id.* ("We do not believe that the *Grace Brethren* ruling was as narrow as respondents contend.")

In addition, the Sixth Circuit rejected the plaintiffs' narrow construction of the doctrine of comity. *Id.* at 1009 ("[T]he very maintenance of respondents' suit unduly intrudes on administration of the State's tax system.") The *Gillis* court specifically rejected the argument that comity should not be invoked if an action may result in an order to state tax officials that could increase taxes. Instead, it focused on the underlying policy that federal courts should not decide state tax issues:

> [W]hile ultimately respondents claim they seek to force the collection of additional taxes, the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax; and the expense to the state in defending the action is identical . . . .
>
> . . . [I]t is noteworthy that the district court would be forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been deprived of their right to equal protection. . . . While respondents insist that such a ruling would work no damage to the fiscal system of the state – since the remedy would be reassessment of those who have been underassessed, rather than refunds to respondents – we cannot logically conclude that no harm would result from a ruling that property assessments have been unconstitutionally administered for years.

836 F.2d at 1008.

Similarly, in *Perez*, 592 F.2d at 1215, the First Circuit found that a federal anti-tax injunction statute applicable to Puerto Rico, which contains essentially the same language as the TIA,[3] prohibits relief that requests an order that some taxpayers be taxed more. The court concluded: "[A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." *Id.*

The Eleventh Circuit has characterized the argument that the TIA does not apply when the requested relief would enlarge tax revenues as "overly literal and technical." *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242 (11th Cir. 1991). In that case, the court noted that the "requested relief, if granted, would require a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system." *Id.* The court further found such intervention would "clearly conflict with the principle underlying the Tax Injunction Act that the federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes." *Id.* The court concluded that the claims were subject to the jurisdictional bar of the TIA. *Id.* at 1243.

The Ninth Circuit acknowledged that the Sixth Circuit "gave a different reading to the Tax Injunction

[3] "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico." *Perez*, 592 F.2d at 1213 (quoting 48 U.S.C. § 872).

Act," but incorrectly found that *Gillis* was distinguishable. (App. 21 n.7). The panel's conclusion that *Gillis* sought interference with a State's tax assessment, but that this case did not, was based on its erroneous definition of "assessment." *Id.* This case too, involves an "assessment," as that term is used in the TIA. "Assessment" is commonly defined as the act of determining tax liability. *See, e.g., Webster's Encyclopedic Unabridged Dictionary* 125 (1996). This case and *Gillis* both involve challenges that affect a determination of tax liability under state law and therefore involve the assessment of taxes. Consequently, the Ninth Circuit's decision directly conflicts with the Sixth Circuit's reasoning in *Gillis*.

Further, like the relief requested in *Gillis*, *Perez*, and *Colonial Pipeline*, the relief requested here, if granted, will affect hundreds of thousands of Arizona taxpayers, leaving their tax liability uncertain until the case is finally decided. It will significantly interfere with the administration of the Arizona income tax. The TIA and comity require Plaintiffs to pursue their case in the Arizona courts. Because the reasoning of the Ninth Circuit conflicts with the different interpretation of the TIA and principles of comity by the First, Sixth, and Eleventh Circuits, this Court should grant the writ to resolve the conflict. *See* Supreme Court Rule 10(b).

II. The Ninth Circuit's Decision Conflicts with the Plain Language of the Tax Injunction Act and the Decisions of This Court Interpreting It and the Principles of Comity.

The Ninth Circuit held that the Plaintiffs' suit does not interfere with the State's ability to assess taxes because, if they are successful, the State will actually collect

more money. (App. 22). This narrow interpretation of the TIA is unsupported by the language of the statute and this Court's application of the principles of comity in federal challenges to the administration of state taxes.

The language of the TIA prevents the district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy *or* collection" of any state tax. 28 U.S.C. § 1341 (emphasis added). Congress plainly intended to restrict federal court jurisdiction over state tax disputes that interfere with the assessment as well as the collection and levy of taxes.

This Court has concluded that the "[e]nactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government," and the "federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes without undue interference from the Federal Judiciary." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826-827 (1997). This Court therefore construes the terms and policy of the TIA broadly to avoid interference with state tax administration, in whatever form. Thus, although the TIA does not prohibit declaratory judgment actions challenging state taxes, this Court has held that such relief is barred. *Grace Brethren Church*, 457 U.S. at 408-09; *see also Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995) (section 1983 actions are generally allowed in state courts, but "the background presumption that federal law generally will not interfere with administration of state taxes leads us to conclude that Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law").

This Court has also recognized that the equitable principles that preclude federal courts from interfering with the administration of state taxes predate and survive the enactment of the TIA. *See Nat'l Private Truck Council*, 515 U.S. at 590 ("[t]he Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation"); *Grace Brethren*, 457 U.S. at 412 (noting "the historical reluctance of the federal courts to interfere with the operation of state tax systems if the taxpayer had available an adequate remedy in the state courts"); *Fair Assessment*, 454 U.S. at 110 ("the principle of comity which predated the Act was not restricted by its passage"). In *Fair Assessment*, this Court thus found that "the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114.

In spite of the inclusive language of the TIA and this Court's expansive interpretation of it, the Ninth Circuit narrowly defined the term "assessment" as used in the TIA and held that it did not apply to the determination of a tax credit. (App. 16). The Ninth Circuit incorrectly defined "assessment" to mean the imposition of a tax or valuing property for purposes of taxing that property. (*Id.*). "Assessment," however, is the act of determining tax liability. *See, e.g., Webster's Encyclopedic Unabridged Dictionary* 125 (1996) ("assess" – "1. to estimate officially the value of (property, income, etc.) as a basis for taxation. 2. to fix or determine the amount of (damages, a tax, a fine, etc.")); *Webster's Third New International Dictionary* 131 (1981) ("assessment" means "the entire plan or scheme fixed upon for charging or taxing"); *Black's Law Dictionary* 116-17 (6th Ed. 1990) (defining "assessment" as "determining the share of tax to be paid by each of many persons").

"Assessment" has an equally broad meaning in the United States Code and is not the same as collection. 26 U.S.C. § 6201(a)(1) (the Secretary shall assess all taxes shown on tax returns); 26 U.S.C. § 6203 ("assessment shall be made by recording the liability of the taxpayer"). As noted by Judge Kleinfeld, Congress understands the term "assessment" to refer to the bottom line, that is, "how much money the taxpayer owes to the government in taxes, after consideration of any credits as well as deductions." (App. 4-5).

There can be no "assessment" of income tax until all deductions and credits have been taken into account because a taxpayer's tax liability is not determined until the end of the calculation. Thus, an injunction that orders the State to disallow tax credits actually enjoins or restrains the State from "assessing" the tax due under state law and is prohibited by the TIA. Consequently, the Ninth Circuit erred in holding that the phrase "restrain the assessment" in the TIA applies only to acts that will result in the collection of revenue. The challenged tax credit is an integral part of the tax assessment process, as are the dozens of other credits and deductions allowed by Arizona law. Because Plaintiffs' requested relief would restrain or, at a minimum, suspend the assessment of state income tax, it is barred by the TIA.

Given the language of the TIA and this Court's expansive interpretation of it and the principles of comity that underly it, the Ninth Circuit erred in defining its terms narrowly to exclude the TIA's application to this case. This Court should grant review to correct the error.

III. The Question Presented Is an Important One that Warrants This Court's Review.

This case strikes at the very heart of federalism. The principles of comity that Congress codified in the TIA articulate a well-reasoned approach to resolving state tax controversies without interference by the federal courts. This Court recognized long ago that taxpayers' attempts to thwart state tax administration through federal court challenges hindered the States. *Great Lakes Dredge & Dock Co.*, 319 U.S. at 297-98. The TIA and principles of comity strike a perfect federalism balance by providing for non-interference with state tax administration in the federal courts *except* where state remedies are not "plain, speedy and efficient." In order for federal court jurisdiction to exist, a party must show that either the state law provided no "speedy and efficient remedy" or that Congress intended for the challenge to be an exception to the TIA. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 n.21 (1983). By building in this procedural safeguard, Congress established policy that significantly limited the federal court's jurisdiction to interfere in the administration of state taxes.

Plaintiffs have an adequate remedy at state law and have never argued that the Arizona court system is not "plain, speedy and efficient." Indeed, the Arizona Supreme Court has already determined the issues raised by plaintiffs. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999). The Ninth Circuit's holding shows little regard for the ability of state courts to decide matters involving the federal Constitution. This lack of confidence in the ability of state court judges to decide federal issues is inconsistent with bedrock principles of

American jurisprudence and this Court's repeated statements. For example, Justice Powell commented that the Court was "unwilling to assume that there now exists a general lack of appropriate sensitivity to [federal] rights in the trial and appellate courts of the several States" and that "there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in the state courthouse." *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (citation and internal quotation marks omitted). Judge Kleinfeld echoed this same sentiment in his dissent from the en banc denial: "State judges take the same oath to uphold the federal Constitution that [federal judges] do, and like [federal judges] are subject to federal Supreme Court review." (App. 8). Thus, he concluded, "[t]here is no excuse for relitigating the constitutionality of Arizona's tuition tax credit in federal court." (*Id.*)

Finally, this Court's final review over state court decisions involving federal issues provides the necessary check on erroneous decisions. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996) (constitutional challenge to state tax dismissed in federal court under the TIA and ultimately heard by the Court on certiorari from the Alabama court). Thus, there are procedures that provide an appropriate role for federal courts, while ensuring that state tax disputes are generally resolved in state, rather than, federal courts. Consequently, the Ninth Circuit erred in holding to the contrary. This Court should grant review to reverse that decision.

CONCLUSION.

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General

PAULA S. BICKETT
Chief Counsel, Civil Appeals

JOSEPH KANEFIELD*
Special Assistant Attorney General

1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8392

**Counsel of Record*

321 F.3d 911

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs-Appellants,

v.

MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Defendant-Appellee.

No. 01-15901

D.C. No. CV-00-00287-EHC

ORDER

Filed March 5, 2003

Before: Mary M. Schroeder, Chief Judge, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

Order: Dissent by Judge Kleinfeld

ORDER

A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35. The request for rehearing en banc is denied.

KLEINFELD, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting from denial of rehearing en banc:

The decision in this case sharply limits the traditional restraints on federal judicial interference with state tax systems and is in conflict with the position of the Sixth Circuit. Despite the Tax Injunction Act and federal common law on comity to the contrary, the panel held that a federal court has jurisdiction to declare a state tax statute unconstitutional and enjoin its application, so long as the effect of the judgment would be to cause the state to collect more revenue rather than less.

The Arizona statute at issue grants a tax credit of up to $500 a year for taxpayer contributions to "school tuition organizations."[1] This is similar to tax deductions for contributions to nonprofit schools, except that it is a credit against taxes owed and not merely a deduction from income subject to taxation. The credit can only offset taxes; no check is mailed by the state to the taxpayer or anyone else.[2] The panel manifested concern that taxpayers were claiming most of the tuition credit for tuition they paid to religious schools.[3]

The Tax Injunction Act says: "The District Courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of

[1] Ariz.Rev.Stat. § 43-1089(A).

[2] *Id.* at § 43-1089(B).

[3] *See Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir.2002).

such state."[4] The decision in this case holds that the challenge to the Arizona tax statute isn't a challenge to an "assessment," because the word refers only to estimation of the value of property or income and imposition of a tax thereon.[5]

Even under this definition, the decision's reasoning does not support its holding. The tax credit amounts to a decision by the Arizona legislature that a taxpayer's income does not include money the taxpayer contributes to a school tuition organization (like a deduction), and goes further than a deduction only in subtracting the amount "above the line," from taxes, rather than below the line. Tax credits are commonly used, by Arizona as well as other states, to encourage conduct (such as installing solar water heaters, in Arizona[6]) even among lower-earning taxpayers who do not itemize deductions.[7] So understood, the tuition credit does indeed amount to an "assessment," because it is an element of the Arizona tax system's estimation of the value of income and imposition of a tax thereon.

The panel's narrowing construction of the Tax Injunction Act ought to have been rejected. The panel relied on definitions of "assessment" from a lay dictionary.[8] Had they looked in a different lay dictionary, the panel would

[4] 28 U.S.C. § 1341 (2000).

[5] *Winn*, 307 F.3d at 1015.

[6] Ariz.Rev.Stat. § 43-1090.

[7] *See id.* at § 43-1041.

[8] *Winn*, 307 F.3d at 1015 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979)).

have found a definition contrary to the one it preferred, such as "the entire plan or scheme fixed upon for charging or taxing."[9] There would be no way to argue sensibly that the Arizona tuition credit wasn't part of "the entire plan or scheme fixed upon for charging or taxing." This broader definition comports with the ordinary meaning of "assessment" as the process of calculating a person's final tax bill after all deductions and credits are accounted for.

Had the panel considered tax treatises and law dictionaries to determine what "assessment" meant, it would have found much in accord with this broader definition. For example, "assessment" is defined as "determining the share of a tax to be paid by each of many persons."[10] It is also defined as "the process of ascertaining and adjusting the shares respectively to be contributed by several persons"[11] such as an individual's final tax bill. Plainly, Arizona uses the tuition credit as a means of determining the amount of tax to be paid by each person.

Even the federal income tax code supports a broad reading of "assessment." The federal income tax code provides that "assessment shall be made by recording the liability of the taxpayer."[12] Thus, under the congressional understanding in the tax code, "assessment" refers to the bottom line, how much money the taxpayer owes to the government in taxes, after consideration of any credits as

[9] WEBSTER's THIRD NEW INTERNATIONAL DICTIONARY 131 (1981).

[10] BLACK'S LAW DICTIONARY 116-17 (6th Ed.1990).

[11] *Id.* at 116.

[12] 26 U.S.C. § 6203 (2002).

well as deductions. There is no reason to think that Congress meant something narrower in the Tax Injunction Act than it did in the Internal Revenue Code. Under this understanding of the meaning of "assessment," plainly the Tax Injunction Act deprives the federal courts of jurisdiction to enjoin states from granting tax credits as part of the calculation of taxes due.

The district court dismissed the case in light of the general understanding federal judges have long had of the broad scope of the Tax Injunction Act. As the Supreme Court put it in *Rosewell v. LaSalle National Bank*: "The Tax Injunction Act generally prohibits federal district courts from enjoining state tax administration except in instances where the state court remedy is not plain, speedy and efficient."[13] This broad understanding does not allow for the niggardly parsing of the word "assessment" adopted by our panel. The Supreme Court and lower courts have interpreted the Tax Injunction Act broadly, declining federal jurisdiction provided that an adequate remedy existed in the state courts.[14]

The panel cites only one case in support of its view that the Tax Injunction Act doesn't speak to cases where, if the plaintiff succeeds, the state will collect more taxes. But the Seventh Circuit case cited, *Dunn v. Carey*,[15] doesn't

[13] *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981).

[14] *See, e.g., California v. Grace Brethren Church*, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *In Re Gillis*, 836 F.2d 1001 (6th Cir.1988).

[15] 808 F.2d 555 (7th Cir.1986).

speak at all to tax credits. And it doesn't construe the term "assessments." It was a dispute about whether taxpayers could use federal court to enjoin local taxes imposed pursuant to a federal consent decree.[16]

Even if the Tax Injunction Act did not require that the panel's holding be overturned, established federal common law of comity would. As the Supreme Court has noted, the Tax Injunction Act "reflect[s] the fundamental principle of comity between federal courts and states governments that is essential to 'Our Federalism.'"[17] *Rosewell* teaches that "even where the Tax Injunction Act would not bar federal court interference with state tax administration, principles of federal equity may nevertheless counsel withholding of relief."[18] Indeed, long before Congress passed the Tax Injunction Act, federal courts ordinarily declined jurisdiction over challenges to state taxes.[19] Congress certainly had a special concern about federal judicial decisions that would directly interfere with collection of state taxes. But Congress did not reject the already established broader principles of federalism and equity protecting states from federal judicial meddling in their

[16] *See id.* at 557-58.

[17] *Fair Assessment in Real Estate Ass'n. v. McNary,* 454 U.S. 100, 103, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).

[18] *Rosewell,* 450 U.S. at 525 n. 33, 101 S.Ct. 1221 (citing *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 301, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943)).

[19] *See, e.g., Matthews v. Rodgers,* 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932); *Singer Sewing Machine Co. v. Benedict,* 229 U.S. 481, 33 S.Ct. 942, 57 L.Ed. 1288 (1913); *Boise Artesian Water Co. v. Boise City,* 213 U.S. 276, 29 S.Ct. 426, 53 L.Ed. 796 (1909).

tax systems.[20] The Supreme Court recognized this in *Fair Assessment in Real Estate Ass'n v. McNary.*[21] Regardless of the Tax Injunction Act, the *Fair Assessment* Court held, as a matter of comity, that damages actions cannot be brought under 42 U.S.C. § 1983 to redress unconstitutional administration of state tax systems, because of the disruptive effect such actions would have on state tax systems.[22]

What this means, as a practical matter, is that federal district courts are required to dismiss claims asserting challenges to state tax systems, whether they are constitutional or not, and whether they are technically within the Tax Injunction Act's ban or not, so long as there is an adequate state remedy available. The district court did just what the law requires. The panel does not contend that state law in Arizona, administered by our colleagues on the Arizona courts does not afford an adequate remedy for unconstitutionality. Nor could they, as Arizona provides a means to challenge its tax code and allows parties to raise federal constitutional challenges to its provisions. Indeed, this very tax credit was challenged on constitutional grounds throughout the Arizona courts. The Arizona Supreme Court provided a thoughtful and scholarly opinion on the merits of the constitutionality of the tax credit at issue in this case.[23] The Arizona Supreme Court is reviewed,

[20] *See, e.g., Fair Assessment in Real Estate Ass'n.,* 454 U.S. at 102-03, 102 S.Ct. 177 (discussing the state autonomy aspects of the Tax Injunction Act).

[21] 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).

[22] *Id.* at 115-16, 102 S.Ct. 177.

[23] *See Kotterman v. Killian,* 193 Ariz. 273, 972 P.2d 606 (Ariz.1999).

as we are, by the Supreme Court of the United States, and, having had the Arizona Supreme Court decision brought to its attention, the Supreme Court of the United States declined to grant certiorari.[24]

State judges take the same oath to uphold the federal Constitution that we do, and like us are subject to federal Supreme Court review. We have no justification for supposing that only we few – among all the judges of the nine states in our circuit – read, understand, or apply the United States Constitution faithfully. The implication of the panel's remark about "the federal courts' role as 'guardians of the people's federal rights'"[25] seems to be that we are the *only* such guardians, or that we are guardians of the Platonic sort. We are not. There is no excuse for relitigating the constitutionality of Arizona's tuition tax credit in federal court.

As to comity, the panel decision conflicts with the Sixth Circuit's decision in *In Re Gillis*.[26] *Gillis* found it unnecessary to decide whether the Tax Injunction Act required dismissal of a challenge to state assessment practice, because "even if the facts of a state tax matter do not technically fall within the language of § 1341, the federal courts should restrain from interfering in state proceedings."[27] *Gillis* points out that even if the effect of

[24] *Kotterman v. Killian*, 528 U.S. 921, 120 S.Ct. 283, 145 L.Ed.2d 237 (1999) (denying certiorari on the Arizona Supreme Court's decision).

[25] *Winn*, 307 F.3d at 1017 (citation omitted).

[26] 836 F.2d 1001 (6th Cir.1988).

[27] *Id.* at 1005.

the federal remedy sought would be to increase taxes collectible (which was true in *Gillis*) state resources would be diverted to litigation, payment of costs and attorneys fees, and such measures as the federal court ordered to attain that relief.[28] The same is plainly true in the case at bar.

The panel opinion expresses what appears to be disdain for what it calls "isolated statements" and "dicta" by the Supreme Court in *Great Lakes* and *Fair Assessment*. I do not find it necessary to parse the Court's opinions in these cases to determine whether we can wash what they say away as dicta, because the principles enunciated are so clear and uncontradicted. We ordinarily treat Supreme Court dicta, if it is dicta, with considerable and appropriate deference.[29] And I am not so sure that the Supreme Court decisions can be properly distinguished. The *ratio decidendi* of *Fair Assessment* – disruption of state tax systems – largely applies to the case at bar. As in *Fair Assessment*, a determination that the state tax scheme was unconstitutional "would halt its operation" and "would hale state officers into federal court."[30] It was halting the system's operation and the haling of state officers into federal court that the *Fair Assessment* Court fastened on as the reason for its holding, not simply revenue collection. *Fair Assessment* held "such interference to be

[28] *Id.* at 1007-08.

[29] *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir.1996); *see also McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 19 (1st Cir.1991).

[30] *Fair Assessment in Real Estate Ass'n*, 454 U.S. at 115, 102 S.Ct. 177.

contrary to 'the scrupulous regard for the right independence of state governments which should at all times actuate the federal courts' "[31] because "the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States" as long as the federal right may be litigated in the courts of the states.[32]

In sum, the panel decision applies a highly unconventional approach to the Tax Injunction Act and the comity principles underlying it, to justify an unprecedented interference with state assessment of taxes. It creates a conflict on comity with our sister circuit, the Sixth. It disdainfully tosses away all that the Supreme Court has said on the issue as mere dicta. And as a result, the states and municipalities of our circuit can expect to spend a lot of their money and tax personnel's time on constitutional litigation in the federal courts, regardless of the remedies provided by our learned colleagues in the states' courts.

---

[31] *Id.* at 116, 102 S.Ct. 177 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 526, 52 S.Ct. 217, 76 L.Ed. 447 (1932)).

[32] *Matthews*, 284 U.S. at 525-26, 52 S.Ct. 217.

---

307 F.3d 1011

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs-Appellants,

v.

MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Defendant-Appellee.

No. 01-15901

D.C. No. CV-00-00287-EHC

OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
June 11, 2002 – San Francisco, California

Filed October 3, 2002

Before: Mary M. Schroeder, Chief Judge, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

Before: SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge.

This case raises the question of when the federal courts may entertain constitutional challenges to state tax laws. Appellants, who are Arizona residents and taxpayers, contend that an Arizona statute permitting tax credits for contributions that support parochial schools violates the Establishment Clause. The district court granted the state's motion to dismiss on the basis that the Tax Injunction Act divests the federal courts of subject matter jurisdiction in this case, and on the basis of general principles of comity and federalism. Neither the statute nor the doctrines relied on by the district court bar Appellants' action. Because Appellants do not challenge any of the types of procedures specified in the Tax Injunction Act, and because they seek to enjoin the granting of a tax credit, rather than the collection of state revenue, the action is justiciable in federal court.

I. BACKGROUND

The statute at issue in this case is Arizona Revised Statute § 43-1089 (hereinafter "§ 1089"). Enacted in 1997, the law permits state tax credits for contributions to organizations called "school tuition organizations." ("STOs"). Section 1089 provides that STOs must be charitable organizations under § 501(c)(3) of the Internal Revenue Code. The tax credit program works as follows: Each Arizona taxpayer may receive a tax credit of up to $500 for the amount of voluntary contributions he or she makes to STOs in any single year; married couples filing jointly may receive a credit of up to $625. § 1089(A)(1)-(2).

There are several limits on the activities of STOs. The organizations are required to spend at least 90% of their revenue on educational scholarships or grants for children

in order to allow those children to attend a private school, including parochial schools. § 1089(E)(3). An STO is not permitted to dispense all of its scholarships or grants to students attending the same school; the statute provides that recipients of an STO's funds must be drawn from at least two different schools. *Id.* A taxpayer cannot request that a contribution to an STO be used for the direct benefit of his dependent. § 1089(D). Finally, an STO cannot distribute grants or scholarships to students who attend schools that discriminate on the basis of race, color, handicap, familial status, or national origin. § 1089(E)(2).

There are no other limits on how STOs operate; thus, an STO may distribute grants only to students attending Catholic schools, Protestant schools, Muslim schools, Jewish schools, or schools maintained by any other single religious sect. STOs may also limit their grants to children of families who belong to a particular faith – Catholic children, Protestant children, Muslim children, or Jewish children, for example. The total amount of funds available for STO grants (and the concomitant revenue loss to the state) is limited only by the number of taxpayers who elect to contribute, rather than pay the amount of their contributions as taxes.

Appellants contend that the tax credit scheme is an impermissible government subsidy of religious schools in violation of the First and Fourteenth Amendments of the Constitution. They point out that under the tax credit system, a substantial amount of money that would otherwise be received by the state and be available for funding public education and other essential public services is diverted to religious institutions to be used for the promulgation of particular religious views. Appellants filed this action in February, 2000, seeking a declaration that the

STO program violates the Establishment Clause of the First Amendment; they also requested an injunction both enjoining the future operation of the program, and requiring the return to the state's general fund of monies already distributed to (but not yet expended by) STOs.

In their complaint, plaintiffs described how the STO tax scheme has worked in practice:[1] In calendar year 1998, the first full year that the tax credit was in effect, STOs reported to the Arizona Department of Revenue that they had received $1.8 million in contributions. At least 94% of that amount was donated to STOs that restrict their scholarships or grants to students attending religious schools; three religious STOs received 85% of the donations made that year. The principal beneficiary of the funds that otherwise would have been paid to the state as tax revenues was the Catholic Diocese of Phoenix.[2] The program expanded significantly in 1999, its second year of operation; according to plaintiffs, the Catholic Diocese of Phoenix alone received $4.5 million for its STO that year,

[1] Because the district court dismissed the case for lack of jurisdiction pursuant to Rule 12(b)(1), for purposes of this appeal the facts as stated in the complaint must be accepted as true. *Wilkins v. United States*, 279 F.3d 782, 784 n. 1 (9th Cir.2002).

[2] The largest single recipient in 1998 was the Catholic Tuition Organization of the Diocese of Phoenix, which received $ 837,140 of the $1.8 million in diverted funds. That organization provides tuition assistance to students attending Catholic schools run by the Catholic Diocese of Phoenix. The second largest single recipient was an STO that restricts its grants to students attending evangelical Christian schools. The third was an STO that restricts its grants to Brophy College Preparatory School, a Catholic all-boys' high school, and its sister school, Xavier College Preparatory School for girls.

and the Catholic Diocese of Tucson reported more than $850,000 in donations as a result of the tax scheme.

The STO program was challenged in the Arizona courts as soon as it was enacted. The program was upheld as constitutional by the Arizona Supreme Court, in a 3-2 decision. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606, *cert. denied*, 528 U.S. 921, 120 S.Ct. 283, 145 L.Ed.2d 237 (1999). Plaintiffs assert that principles of res judicata do not bar the instant action, and defendants have not raised a res judicata defense either here or in the district court.

Arizona[3] moved to dismiss the complaint on two grounds: (1) on the basis of Eleventh Amendment immunity; and (2) on the basis of a lack of subject matter jurisdiction resulting from the Tax Injunction Act, 28 U.S.C. § 1341, as well as from principles of comity. Simultaneously, a number of parties sought intervention in the lawsuit. The district court granted the motion to dismiss on the ground that the Tax Injunction Act as well as comity preclude federal jurisdiction over plaintiffs' claim; it did not rule on either the motions to intervene or the Eleventh Amendment argument. A timely appeal was filed.

II. DISCUSSION

A. Tax Injunction Act

The Tax Injunction Act precludes district courts from interfering with a state's "assessment, levy, or collection"

[3] The nominal defendant in this action is Mark W. Killian, who is sued in his official capacity as Director of the Arizona Department of Revenue. For simplicity, in this opinion we refer to the defendant as "Arizona."

of state taxes where an efficient remedy is available in state court.[4] Arizona does not contend that any relief that the district court might order in this case would interfere with a "levy" or "collection" of any taxes. Rather, it asserts that the Tax Injunction Act bars this action because the STO tax credit is part of Arizona's general system of tax "assessment." In other words, according to Arizona, the tax credit is part of the overall calculus by which the state determines how much revenue it will receive from each taxpayer. This broad reading of the word "assessment," however, is supported neither by any precedent interpreting "assessment" in this manner, nor by the meaning of the word itself. The term "assessment" has two definitions relevant to the question presented in this case: (1) "to estimate officially the value of (property, income, etc.) as a basis for taxation," and (2) "to impose a tax or other charge on." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979). Neither definition of the term describes the role of the STO tax credit in the Arizona tax system: (1) the STO credit available to a taxpayer is a uniform amount that is applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the "assessment" of property or income as a basis for the imposition of taxes,[5] and (2) the

[4] The Tax Injunction Act provides in its entirety as follows:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1341.

[5] All taxpayers, regardless of their tax bracket or adjusted gross income, may receive up to the standard sums of either $500 or $625 in tax credits for STO contributions (depending on the taxpayer's filing

(Continued on following page)

challenged practice is not the imposition of a tax; quite the contrary, it is the grant of a benefit in the form of an excuse from paying a portion of the taxes already assessed.

The district court agreed with Arizona's contention that the STO credit constitutes a "tax assessment," and that this action is consequently barred. It stated that *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir.1989), compelled its conclusion. *Blangeres*, however, involved a federal lawsuit in which individuals sought to prevent a company from disclosing documents that were necessary to the state's valuation of certain taxable assets belonging to a corporation. Thus, the suit affected the state's ability to determine the value of a taxpaying entity's taxable income, or to "assess" the assets as the term is defined in the first of the two definitions set forth above. In short, *Blangeres* held that a lawsuit challenging the methods by which the state obtains information used for the valuation of taxable property is barred by

status and the amount of his contributions to STOs). Whatever a taxpayer contributes to an STO is subtracted directly from his tax bill *after* his income is assessed and his tax liability calculated. From a purely financial perspective, then, a taxpayer is unaffected by his decision as to whether or not to make an STO contribution. The funds that he may contribute will be unavailable to him in any event: they will be used either to make the contribution or to pay the taxes he owes. We note that a tax credit differs from a tax deduction in that where a tax deduction is involved, giving money to a religious institution is not, as is the case of a tax credit, a free gift. In the case of a tax credit, the taxes due are reduced by the full amount of the gift. In contrast, when a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved: it is only his taxable income that is reduced by the amount of the gift, and, thus, his tax liability is reduced only by a percentage of the gift that is equal to the tax rate applicable to his income bracket.

the Tax Injunction Act, because any relief would prevent the state from accurately assessing taxes. *Blangeres* does not support defendant's argument here.

Moreover, if plaintiffs were to receive the relief that they seek in this action, there would be no violation of the purposes or policy underlying the Tax Injunction Act. Congress sought to implement two purposes when it passed the Act in 1937. They are well-documented in both the legislative record and in subsequent cases. *See, e.g., Aluminum Co. v. Department of Treasury,* 522 F.2d 1120, 1124 (6th Cir.1975); *Hargrave v. McKinney,* 413 F.2d 320, 326 (5th Cir.1969). The first purpose, which is not relevant to the instant appeal, involves the discriminatory effect of diversity jurisdiction in tax cases.[6]

The second, more relevant purpose was to prevent disruption of a state's efforts to collect tax revenues. That concern is clearly expressed in the committee reports prepared when the Act was under consideration in Congress:

[6] Congress sought to eliminate an advantage that existed for foreign parties: prior to passage of the Act, such individuals or corporations could sue a state for injunctive relief in federal court on the basis of diversity jurisdiction and avoid paying the disputed tax until the challenge was resolved. In contrast, state residents – because they are not diverse – were forced to seek redress only in state courts, which typically required a party to pay a disputed tax first, and challenge it thereafter. S.Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). ("If those to whom the federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the federal courts need only pay what they choose and withhold the balance during the period of litigation.").

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt state and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

S.Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). See also *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 527, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (explaining that if injunctive relief prohibiting the collection of a state tax was available, then "during the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency."); RICHARD H. FALLON, ET AL, HART AND WECHSLER's THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1216-17 (4th ed. 1996) (In passing the Tax Injunction Act, Congress was "concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting governmental finances.").

We have not previously addressed the scope of the Tax Injunction Act with respect to suits challenging tax credits. We have, however, recognized on a number of occasions that a fundamental concern of the Act is ensuring that state coffers do not become bare as a result of federal court

injunctive action. For instance, in *Dillon v. State of Montana*, 634 F.2d 463 (9th Cir.1980), we held that a refund action was barred by the Tax Injunction Act because a federal court order requiring a state to grant a tax refund is functionally equivalent to an order preventing the collection of taxes. When determining whether federal court injunctive action is permissible under the Act, *Dillon* stated that a federal court is to look at "[t]he practical effect on state fiscal operations" of the federal court order that plaintiffs seek. *Id.* at 466. *See also Poer & Co., et al. v. Counties of Alameda, et al.*, 725 F.2d 1234, 1235 (9th Cir.1984) (holding that jurisdiction does not exist to entertain an action for an injunction that would result in a tax refund). We applied the same "practical" approach in *Bidart Brothers v. California Apple Commission*, 73 F.3d 925, 930 (9th Cir.1996), in which we held that certain state agency fees did not constitute "taxes" for purposes of the Act, principally because they were not "assessments that if enjoined would threaten the flow of central revenues of state governments. . . ."

Applying that functional analysis here, we hold that a federal action challenging the granting of a state tax credit is not prohibited by the Tax Injunction Act. The invalidation of a tax credit, such as the one at issue here, does not adversely affect the state's ability to raise revenue. If the STO tax scheme were to be struck down on Establishment Clause grounds, Arizona's ability to raise revenue would not be diminished; to the contrary, it would be enhanced. Thus, if the district court were ultimately to rule for the plaintiffs on the merits, the Act's primary policy of non-interference with state revenue collection would not be undermined in any way.

Arizona essentially argues that the Tax Injunction Act bars *any* federal litigation regarding the constitutionality of state taxes. Even if the STO tax credit is not an assessment, Arizona argues, the Tax Injunction Act's general policy of non-interference with state tax matters counsels against allowing this action to proceed. Such a broad reading of the Act is inconsistent with our precedent, the language of the Act, the legislative purpose set forth above, and the federal courts' role as "guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

We agree with the interpretation of the Tax Injunction Act adopted by the Seventh Circuit. That court, like ours, applies a searching analysis of the *effect* of federal litigation on the state's ability to collect revenues, and will only bar the adjudication of a federal constitutional claim in federal court if a judgment for the plaintiffs will hamper a state's ability to raise revenue. *Dunn v. Carey*, 808 F.2d 555 (7th Cir.1986).[7] In *Dunn*, the plaintiffs' requested

[7] We note that the Sixth Circuit in *In Re Gillis*, 836 F.2d 1001 (6th Cir.1988), gave a different reading to the Tax Injunction Act. In *Gillis*, the court stated that if a suit "unduly intrudes on administration of the State's tax system," then it is precluded by the Act. *Id.* at 1009. In that case, the plaintiffs challenged Kentucky's system of tax assessment of coal, oil, and gas interests, charging that such properties were systematically underassessed for tax purposes. The *Gillis* plaintiffs contended that their claims were not foreclosed by the Tax Injunction Act because if they prevailed, it would lead to *increased* tax revenues for the state. The Sixth Circuit rejected this argument, taking a broad view of the scope of the Act's limit on federal court jurisdiction. Nevertheless, despite its broad language, the Sixth Circuit's decision is distinguishable from the case before us, because the court in *Gillis was* asked to do precisely what the Tax Injunction Act forbids – to interfere with a state's "*assessment*" of a tax, one of the three state functions specified in

(Continued on following page)

relief, as here, would have resulted in the state's collecting more tax revenue than it would have otherwise. The Seventh Circuit held that for that reason the action was not barred by the Tax Injunction Act, and rejected a broad interpretation of the Act that would govern "any federal litigation touching on the subject of state taxes." *Id.* at 558. *Dunn* continued: "[t]he text of [the Act] does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise additional taxes." *Id.* The same holds true here where Appellants' requested relief would result in the elimination of a tax credit – and, accordingly, produce more revenues for Arizona.[8]

In sum, we hold that because plaintiffs attack the grant of a tax credit, which is not one of the three types of state tax procedures barred from challenge in federal court by the Tax Injunction Act, the district court erred in

---

§ 1341. Here no interference with any of the functions specified in the statute is involved.

[8] The reported cases factually most similar to this one are two district court cases. In *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I.1996), affirmed on other grounds, 127 F.3d 184 (1st Cir.1997), the court held that an Establishment Clause challenge to a state tax exemption was *not* barred by the Tax Injunction Act. It held:

> It is clear from the very text of the statute that it is not applicable in this instance. The present action is not an action to "enjoin, suspend or restrain" the collection of taxes. In fact it is quite the opposite. This is, in essence, an action to compel the State of Rhode Island to collect taxes.

928 F.Supp. at 159. *See also Moton v. Lambert*, 508 F.Supp. 367, 368 (N.D.Miss.1981) (plaintiffs' challenge to a tax exemption for racially segregated schools is not barred by the Tax Injunction Act because, if successful, would have the effect of increasing state revenues).

dismissing the action pursuant to that Act. Equally important, the relief requested by plaintiffs in this action would not hinder Arizona in its ability to impose taxes or collect revenue, but in fact would result in the state's receiving more funds that could be used for the public benefit. The Tax Injunction Act does not preclude federal courts from taking actions designed to increase the revenues available to the states, nor to remove unconstitutional barriers to the states' collection of the full amount of taxes they have levied or assessed.

B. Comity

The district court held as an alternative ground for its dismissal of this action that principles of comity preclude lawsuits involving potential federal court interference in the administration of state tax systems. The district court held that a federal court action that disrupts the domestic tax policy of a state is barred by principles of comity, regardless of whether the action relates to the collection of taxes, to tax deductions, or to tax credits. This broad bar to the litigation of federal constitutional claims in federal court is unsupported by precedent, and we reject it.

The Supreme Court has twice held federal jurisdiction to be barred by the doctrine of comity in cases in which state tax measures were challenged. Both, however, are cases in which the plaintiffs sought to stop the collection of a tax; thus, they are fundamentally different from the instant case.

In the first, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), the plaintiffs challenged a Louisiana tax on dormant commerce clause grounds, and sought a declaration that it

was invalid. Although the then-newly-passed Tax Injunction Act only bars injunctive relief by federal courts, the Supreme Court held that the Act merely codified preexisting principles of comity that prevent interference with the states' collection of revenue. Thus, comity required the dismissal of the declaratory judgment action for the same reason the Tax Injunction Act was enacted. *Id.* at 297, 63 S.Ct. 1070. "[T]he federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers *from collecting state taxes* where state law affords an adequate remedy to the taxpayer." *Id.* (citing *Matthews v. Rodgers,* 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932)) (emphasis added).

Arizona cites isolated statements from *Great Lakes* in support of its broad theory of comity. Such dicta is of limited significance. For instance, it is true that in *Great Lakes,* the Court stated that "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Id.* at 298, 63 S.Ct. 1070. This statement alone, however, does not warrant expanding the doctrine of comity from precluding actions that affect the ability of states to raise revenue, to precluding *all* actions that relate to state tax administration, including actions designed to prevent the violation by the states of fundamental First Amendment guarantees. Indeed, the statement on which the state relies is generally applicable to any constitutional challenge to state law in federal court. It is not limited to state tax cases. Surely, the dicta did not mean that federal courts should not protect the constitutional rights of

individuals against the implementation of unlawful state policies. Further, the dicta states only that federal courts should not "needless[ly] obstruct" state domestic policies. Ordinarily, however, when the policies that the state is enforcing are unconstitutional, precluding their application is not "needless" but necessary.

The second of the Supreme Court's comity cases involving the constitutionality of state tax laws is *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). There, plaintiffs alleged that a state's property tax assessment procedures did not comport with due process, and sought damages from the tax collectors pursuant to 42 U.S.C. § 1983. The Supreme Court held the suit to be barred by comity principles. Although the action was not directly prohibited by the Tax Injunction Act because plaintiffs sought damages under § 1983 rather than injunctive relief, the Court held that "petitioner's action would 'in every practical sense operate to suspend collection of the state taxes. . . .'" *Id.* at 115, 102 S.Ct. 177 (quoting *Great Lakes,* 319 U.S. at 299, 63 S.Ct. 1070).

In *McNary,* as in *Great Lakes,* the federal action was dismissed because it would have hindered the state's ability to collect revenue. In particular, the *McNary* Court expressed concern that a judgment for plaintiffs would have had a significant ripple effect on a number of state tax provisions that depended on the challenged assessment procedure, and would have unduly constrained the activities of state officials implementing that procedure due to the fear of potential liability under § 1983, as well as an aversion to the burden of defending § 1983 actions. In contrast, an ultimate judgment on the merits for plaintiffs here – much less the conduct of this litigation – would have

no effect at all on the implementation of any other Arizona tax provisions, nor would it chill the activities of Arizona tax collectors. The STO credit is a limited, discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes in other ways, and would, in fact, produce substantial additional revenue for the state. Although it, like any state statute, expresses the policy views of the state of Arizona, and thus should not be lightly disregarded, in this case Arizona identifies no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional. Accordingly, comity does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue.

CONCLUSION

Because both the Tax Injunction Act and the doctrine of comity, as it has been applied to federal tax cases involving state tax laws, are primarily concerned with federal litigation that interferes with the ability of the states to raise necessary tax revenues, they are inapplicable here. Accordingly, we REVERSE the district court's grant of Arizona's motion to dismiss and REMAND the case for further proceedings.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer,; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	)	No. CIV-00-287-PHX-EHC **ORDER**

Pending before the Court is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. [Dkt. 3]. Defendant argues that the Tax Injunction Act and the Eleventh Amendment divest this Court of jurisdiction to hear this action. Plaintiffs filed a Response claiming that neither the Tax Injunction Act nor the Eleventh Amendment applies to this action. [Dkt. 14]. For the reasons that follow, the Court finds that the Tax Injunction Act and the principles of comity divest the Court of subject matter jurisdiction to hear this case.

I. Background:

Plaintiffs filed this action on February 15, 2000 challenging the constitutionality of A.R.S. §43-1089 ("§43-1089")

under the First and Fourteenth Amendments. Section 43-1089 allows any taxpayer who pays Arizona income tax to receive a tuition tax credit for up to $500 of his annual tax liability. Under §43-1089 taxpayers can pay up to $500 of their tax liability for a given year to a "student tuition organization" ("STO") rather than paying that amount to the State of Arizona. Each STO uses the tax dollars to provide tuition grants to students attending the non-public schools that the STO is affiliated with. For every dollar that is paid to a STO, the taxpayer is given a dollar for dollar credit. Section 43-1089 places no limit on the amount of funds that can be diverted to STO's through tax credits. In addition, the credit is available to all taxpayers; there is no requirement that the taxpayer have any children in school or have incurred any educational expenses.

Under §43-1089, STO's have two obligations. First they are required to use at least 90% of the payments they receive from taxpayers for tuition grants to children who attend private primary or secondary schools in Arizona. Second, they must make tuition grants available to students at more than one non-public school.

Plaintiffs allege that the largest STO's are religious organizations that restrict their donations to religious non-public schools which in turn, use these funds to promote religious education and worship. As an example, Plaintiffs claim that in 1998 at least $1,708,769 of $1,815,799 collected from taxpayers went to STO's that restrict tuition grants of state funds to students attending religious schools. Plaintiffs argue that because the STO's are dominated by religious organizations that restrict grants to religious schools, parents who wish to send their children to a non-religious private school may be unable to

find an STO that is willing to make a tuition grant to a non-religious private school. Plaintiffs allege that, as it is currently operating, the tax credit authorized by §43-1089 allows state revenues to fund education in a religiously-preferential manner in violation of the First and Fourteenth Amendments.

Plaintiffs seek preliminary and permanent injunctive relief, a declaratory judgment that §43-1089, on its face and as applied, violates the First and Fourteenth Amendments, and that STO's which make tuition grants to only one religious denomination return grants to the State of Arizona general fund.

II. Motion to Dismiss Standard

When considering a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. *Peat Marwick Main & Co. v. Tew*, 486 U.S. 1055 (1988). The court should not grant a motion to dismiss "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citations omitted).

III. Discussion

A. The Tax Injunction Act

Defendant, in his Motion to Dismiss, argues that the Tax Injunction Act, ("TIA") deprives this Court of jurisdiction. The TIA, 28 U.S.C. §1341, provides in relevant part:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any

> tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

The Supreme Court has clearly held that the TIA prohibits a district court from issuing a declaratory judgment holding state tax laws to be unconstitutional. *See California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (holding that with regard to collection actions the TIA prohibits district courts from issuing a declaratory judgment that a state tax law is unconstitutional). Plaintiffs argue, nonetheless, that this language from *Grace Brethren*, and similarly the language of the TIA, is limited to holding that declaratory relief is only unavailable when injunctive relief is unavailable; that is, only when the collection of state taxes is interfered with.[1] *See In re Gillis*, 836 F.2d 1001, 1004-1005 (6th Cir. 1988).

Plaintiffs, in essence, argue that the TIA is limited to actions that implicate the collection of taxes. Therefore, Plaintiffs argue, because the present case involves a tax credit, and does not implicate the collection of taxes, the TIA does not apply. The Seventh Circuit and the District of Rhode Island have adopted this interpretation of the TIA. *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986); *Rojas v. Fitch*, 925 F.Supp. 155 (D.R.I. 1996). The Sixth Circuit has, however, rejected this narrow interpretation of the TIA

[1] Neither party argues that a plain, speedy and efficient remedy to resolve this dispute is unavailable in Arizona state courts. In fact, an identical challenge to the constitutionality §43-1089 has been rejected by the Supreme Court of Arizona. *See Kotterman v. Killian*, 972 P.2d 606 (1999), *cert. denied* 528 U.S. 921 *cert. also denied by Rhodes v. Killian*, 528 U.S. 810.

and has instead construed the TIA more broadly, applying the language in *Grace Brethren* to state tax laws that do not involve collection of state taxes. *In re Gillis*, 836 F.2d at 1005.

This Court, for several reasons, finds the Sixth Circuit's interpretation of the TIA more persuasive and finds that the jurisdictional bar imposed by the TIA and discussed in *Grace Brethren* was not limited to the collection of taxes. First, the TIA, as evidenced by the language of the Act, is not limited to the collection of taxes. *In re Gillis*, 836 at 1005. By preventing restraints on both the assessment and collection of taxes, Congress indicated that the TIA is not limited to collection only but was intended to encompass the process that the state uses in its determination of tax liability. Therefore when the state offers tax credits to reduce tax liability, the credits become an integral part of the State's assessment of each taxpayer's liability. For this reason, any determination that A.R.S. §43-1089 is unconstitutional would restrain the State's ability to assess taxes in accordance with its state tax system.

This Court's conclusion is supported by decisions where the Ninth Circuit has broadly defined the term "assessment" to prevent district courts from exercising jurisdiction in other cases involving state taxes. *See Aston v. Cory*, 780 F.2d 816, 821 (9th Cir. 1986) ("The Court has long recognized the dangers inherent in disrupting the administration of state tax systems and the corresponding need for federal court restraint when deciding cases that will affect these delicate state operations"). Thus, in *Blangers v. Burlington Northern, Inc.*, the Ninth Circuit held that the TIA applied to indirect as well as direct restraints on assessment of taxes. 872 F.2d 327 (9th Cir.

1989) (holding that the district court properly dismissed a claim for lack of jurisdiction under the TIA because granting an injunction against railroad employers from disclosing their employees' earning records and other tax related information to tax authorities would constitute a restraint on the state's assessment of taxes). Additionally, the Ninth Circuit has recently held that an action that seeks federal court intrusion, such as an injunction preventing the assessment board's review hearing to go forward, into the state's taxation process divests the district court of jurisdiction. *Jerron West Inc. v. State of California State Board of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1998).

Second, the legislative history of the TIA and the case law interpreting the TIA direct the Court to broadly construe the TIA in accordance with the strong federal policy of non-interference with state taxing authority.[2] An example of this reasoning is *Fair Assessment in Real Estate Ass'n Inc. v. McNary*, 454 U.S. 100, 108 (1981). In *Fair Assessment*, the United States Supreme Court expanded the jurisdictional bar imposed by the TIA to cover declaratory actions even though the TIA did not expressly provide for this prohibition. *Id.* The Court explained that

[2] The Court notes that similar challenges to state tax credits have been considered by District Courts and have proceeded up to the United States Supreme Court where they were ultimately decided upon their merits. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 789-98 (1973); *See Muller v. Allen*, 463 U.S. 388 (1983). Although these actions involve similar challenges to state tax laws, there is no evidence that any of the Courts considered the applicability of the TIA, and consequently the Court does not rely upon the exercise of jurisdiction in those cases to establish jurisdiction in the present case. *See Doe v. Madison School District*, 177 F.3d 789, 795 (9th Cir. 1999) (stating that "the exercise of jurisdiction does not establish jurisdiction").

nothing in the legislative history of the TIA, and its predecessor 28 U.S.C. § 1342, suggests that Congress intended to limit federal-court deference in state tax matters to those activities enumerated within these sections. *Fair Assessment*, 454 U.S. at 110 (citing H.R.Rep.No. 1503, 75th Cong., 1st Sess., 1 (1937); 81 Cong. Rec. 1415 (1937)). The Supreme Court went on to state its reasons for broadly construing the TIA, "[t]he scrupulous regard for the rightful independence of state government . . ., and a proper reluctance to interfere . . . with their fiscal operations, require that [injunctive] relief should be denied in every case where the asserted federal right may be preserved without it." *Id.* (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)). The Supreme Court also noted that the TIA should be applied to prevent the disruption of operation of the state taxing scheme by preventing plaintiffs from summoning state tax officials into federal court to defend their tax assessments. *Fair Assessment*, 454 U.S. at 114. Later, the Supreme Court affirmed its prior reading of the TIA: "Given the strong background presumption against interference with state taxation, the TIA may be understood as but a partial codification of the federal reluctance to interfere with state taxation." *National Truck Council Inc., v. Oklahoma Tax Commission*, 515 U.S. 582, 590 (1995).

The TIA has also been similarly construed by the Ninth Circuit. In *Poer and Co. v. Counties of Alameda*, the Ninth Circuit found the TIA applicable to actions for refunds or damages even though the language of the TIA does not specifically cover these actions, finding that federal court consideration of these actions would deprive the TIA of its full intended effects. 725 F.2d 1234, 1236 (9th Cir. 1984). The court went on to hold that the rule

codified within the TIA was intended to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems. *Id.* (citing *Dillion v. State of Montana*, 634 F.2d 463 (9th Cir. 1980).

Because the same concerns are present when district courts consider the constitutionality of tax credits as when they consider the constitutionality of state tax laws that provide for collection of taxes, the district court would risk interfering with state sovereignty and seriously disrupting the state taxation scheme.

Accordingly, this Court finds that the phrase "restrain the assessment" in the TIA divests the Court of jurisdiction to issue a declaratory judgment which has the potential to invalidate a state tax law giving a tax credit.

B. Comity

Assuming the tax credits are not covered by the specific language of the TIA, the underlying principles of comity and equitable restraint that are embodied in the Act prevent this Court from exercising jurisdiction over the action. *See Fair Assessment*, 454 U.S. at 108; *see also In re Gillis*, 836 F.2d at 1005. The importance of federal courts avoiding the obstructing [sic] the domestic policies of the states has been clearly and consistently recognized by the Supreme Court in other cases involving the TIA. As early as 1943 the Supreme Court recognized, "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the court of the United States. If the remedy at law is plain adequate and complete, the aggrieved party is left to that remedy in the state courts." *Great Lakes*

Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (Citations omitted).

In *Roswell v. LaSalle National Bank*, 450 U.S. 503, 552 (1976) and *Fair Assessment*, 454 U.S. at 105, the Supreme Court reiterated the importance of withholding equitable relief to preserve comity. In *Rosewell*, the Court stated that even where the TIA would not bar federal court interference in state tax administration, principles of equity may counsel withholding relief. 450 U.S. at 525, n. 33. In *Fair Assessment*, the Supreme Court, while recognizing the strong federal policy underlying § 1983 permitting the vindication of constitutional violations by state officials in federal court, the Court found that the principle of comity controlled and prevented the Court from hearing a claim of unconstitutionality of state tax law where an adequate state remedy was available. 454 U.S. at 107. Similarly, in *Ashton*, the Ninth circuit found the principles of comity and deference to the state tax administration were paramount to the considerable interest of uniformity in interpreting §522(e)(1) of ERISA. 780 F.2d at 822.

Here, the principles of comity also take precedence. Recognizing the importance of state autonomy not only to collect taxes but also to administer its taxing system in accordance with state priorities and needs, the Court concludes that Plaintiffs have an adequate remedy available in the Arizona State Courts and for that reason, the principles of comity require Plaintiffs to utilize that remedy to challenge A.R.S. §43-1089.

IV. Conclusion

Accordingly, the Court finds that the Tax Injunction Act and the underlying principles of comity divest this Court of subject matter jurisdiction.[3]

The Court being fully advised,

IT IS ORDERED granting Defendant's Motion to Dismiss. [Dkt. 3]. All other pending motions are denied as moot. [Dkts. 4, 6, 10 & 23].

DATED this 26th day of February, 2001.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

[3] Because the Court finds that the Tax Injunction Act and the principles of comity prevent this Court from exercising jurisdiction over this action, the Court does not reach Defendant's argument that the Eleventh Amendment applies to the present action.

ARIZONA REVISED STATUTES

A.R.S. § 43-1089

Credit for contributions to school tuition organization; definitions

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization, but not exceeding:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

2. Six hundred twenty-five dollars in any taxable year for a married couple filing a joint return. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

B. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

C. The credit allowed by this section is in lieu of any deduction pursuant to § 170 of the internal revenue code and taken for state tax purposes.

D. The tax credit is not allowed if the taxpayer designates the taxpayer's donation to the school tuition organization for the direct benefit of any dependent of the taxpayer.

E. For purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Preschool moderate delay.

(d) Preschool severe delay.

(e) Preschool speech or language delay.

2. "Qualified school" means a nongovernmental primary school, secondary school or a preschool for handicapped students, which is located in this state that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.